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Tampering with Border Protection: The Legal and Policy Implications of the Voyage of the MV Tampa

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Abstract

While the events of 11 September 2001 and the "children overboard incident" have overshadowed it in the popular press, the voyage of the MV Tampa in August and September 2001 has had a significant impact upon Australian law and policy. The Tampa incident has seen both a substantial change in Australian law, with alterations to customs and migration legislation, and a dramatic change in Australian policy towards unauthorised boat arrivals. This chapter will consider the incident in some detail, and examine its long-term consequences for Australian offshore law enforcement and policy.

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4 Tampering with Border Protection: The Legal and Policy Implications of the Voyage of the MV *Tampa*

Stuart Kaye

Introduction

While the events of 11 September 2001 and the "children overboard incident" have overshadowed it in the popular press, the voyage of the MV *Tampa* in August and September 2001 has had a significant impact upon Australian law and policy. The *Tampa* incident has seen both a substantial change in Australian law, with alterations to customs and migration legislation, and a dramatic change in Australian policy towards unauthorised boat arrivals. This chapter will consider the incident in some detail, and examine its long-term consequences for Australian offshore law enforcement and policy.

The Voyage of the MV *Tampa*¹

The MV *Tampa* is a Norwegian-registered container vessel of around 45,000 tonnes displacement.² In August 2001, it was in the north-east Indian Ocean, proceeding to Singapore from Fremantle, with a cargo of in excess of A\$20 million in value. The *Tampa* was planning to discharge its cargo in Singapore. On the evening of 26 August the Indonesian vessel, the *Palapa*, carrying over 436 passengers and crew,³ was

¹ This account is derived from a variety of sources, including various news reports, the two Federal Court judgments and press releases.

² The dimensions of *Tampa* were 262 metres in length, displacing 44,013 deadweight tonnes.

³ I have derived the following figure from information provided by Immigration and Defence. In the media, the figures on the number of individuals aboard the *Tampa* varied widely from 420 to 440. In addition, the number of pregnant women varied from between two and five inclusive. Injuries on board ranged from a broken leg to nothing more than a cut thumb, when variously described by the solicitor for the shipowners, to an answer to a question in Parliament by the Minister for Immigration and Multicultural Affairs.

proceeding southward towards Australian waters. The *Palapa* was a vessel of wooden construction and was only 20 metres in length and, as a consequence, was dangerously overloaded. The passengers, who were largely of Afghan origin, were intending to enter Australia, but none possessed valid visas to permit entry, nor had Australian authorities been advised by the *Palapa*'s master that the vessel was intending to discharge his passengers in Australia. During the night, the *Palapa* began to founder, and a distress signal was sent requesting assistance. The signal was received by the Australian Maritime Safety Authority (AMSA) in Canberra, and since the *Palapa*'s position placed it in waters subject to Indonesian responsibility for search and rescue (SAR),⁴ the distress call was forwarded to the relevant Indonesian agency. AMSA were advised that there were some 80 persons aboard.

The Indonesian SAR authorities requested *Tampa*, the nearest appropriate vessel in the area, to proceed to the *Palapa*'s position and render what assistance it could. *Tampa* reached the *Palapa* late on 26 August and, in difficult circumstances, was able to transfer the passengers and crew to the *Tampa* before the *Palapa* foundered.⁵ A makeshift shelter was then constructed on deck for the rescued passengers and crew, making use of several empty containers. The master of the *Tampa* then turned and made for the Indonesian port of Merak, the nearest port large enough to accommodate his ship.

Soon after, a number of the rescuees from the *Tampa* sought out the ship's master, Captain Arne Rinnan and requested that he take them to Australia. He refused, and an exchange took place, where the rescuees reiterated their desire to be taken to Australia. While no threat was made, the master of the *Tampa* felt pressure to proceed to Australia, and directed that the ship make for Christmas Island, the nearest Australian territory. During the day of 27 August, he attempted to turn the ship back on course to Indonesia, but this was detected by the rescuees, presumably from the position of the sun, and saw them reassert their demand to be taken to Australia. Captain Rinnan returned to a heading to take *Tampa* to Christmas Island.

⁴ Eighty-five miles north of Christmas Island, and 158 miles south of Java. The location is within both the Indonesian SAR area of responsibility, and the Indonesian exclusive economic zone (EEZ).

⁵ M.W.D. White notes that this was accomplished at substantial risk to the *Tampa*'s first officer. See White, "The MV *Tampa* and the Christmas Island Incident," *Proctor*, Vol. 21, No. 10, 2001, p. 14.

While transiting towards Christmas Island, Captain Rinnan contacted Australian authorities, indicating both that he was making for Christmas Island and the circumstances on board. He was directed on 27 August by Australian authorities from the Department of Immigration that the *Tampa* would not be permitted to discharge its passengers at Christmas Island, nor would it be permitted to enter Australian territorial waters. The *Tampa* subsequently anchored 13.5 nautical miles off Christmas Island, just outside Australian territorial waters. A stand-off then ensued, with *Tampa* remaining just outside Australian waters for the next two days. Court proceedings were initiated by the Victorian Council of Civil Liberties, and a Victorian solicitor, Eric Vardalis. These proceedings sought an injunction to have the individuals aboard the *Tampa* brought ashore and to permit access to legal counsel for the rescuees. The outcome of the various court proceedings is discussed below.

On 29 August, after repeated requests to bring the *Tampa* into Australian waters to discharge the rescuees by Captain Rinnan, the *Tampa* steamed into the Australian territorial sea heading towards Christmas Island. This action was initiated by Captain Rinnan out of concern for his ability to continue to provide care for the rescuees, and his unwillingness to make for another destination. Before the *Tampa* reached the roadstead off Flying Fish Cove, it was boarded, without resistance, by members of the Australian Defence Force (ADF), who asked that the vessel leave Australian waters, and not proceed further. Captain Rinnan stopped the vessel, and indicated he would not leave Australian waters. The ADF personnel did not leave the vessel, nor did they attempt to remove it from the territorial sea. Flying Fish Cove was closed to all vessels, and no unauthorised individuals or boats were permitted to approach the *Tampa*. However, the Norwegian Ambassador was able to visit the vessel on 30 August, and spoke to the master and some of the rescuees. Humanitarian assistance, including food, medical supplies and other items began to be delivered to the ship, but contact between the shore and the rescuees was not permitted.

The Royal Australian Navy dispatched several vessels to Christmas Island to monitor events. These included HMAS *Manoora*, an amphibious troop ship that had been returning from Southeast Asia. *Manoora*'s presence was fortuitous, as it had sufficient accommodation for all of the rescuees, as well as hospital facilities aboard. On 1 September, the Prime Minister announced that the rescuees, if they were willing, would be taken aboard *Manoora* to be trans-shipped to New Zealand and Nauru, via Papua New Guinea. The agreement provided that

no rescuee would be permitted ashore. Those who refused to embark upon the *Manoora* would remain aboard the *Tampa*.

All the rescuees were taken aboard *Manoora* on 3 September, with the exception of the *Palapa*'s Indonesian crew, who were taken to Christmas Island and either charged with immigration offences or deported to Indonesia.⁶ *Manoora* headed east, initially en route to Port Moresby. However, during the voyage, other SUNCs were intercepted in the vicinity of the Ashmore Islands,⁷ and transported to *Manoora*. In addition, it became apparent that it would be undesirable to offload the rescuees in Papua New Guinea. As such, *Manoora* proceeded to Nauru, during which time the litigation in the Federal Court saw determinations at first instance and on appeal.

Upon arrival off Nauru on 17 September, the issue of getting the rescuees off the *Manoora* was brought into focus. A number of individuals refused to leave the ship, demanding to be taken to Australia. The then Defence Minister announced that they would not be forcibly removed from the ship, but after two weeks waiting off Nauru, efforts to remove the individuals began to be made. By 4 October all of the individuals were relocated to Nauru or by aircraft to New Zealand.

Court Proceedings in the Federal Court

At First Instance

Although the individuals aboard the *Tampa* lacked the opportunity to appear in front of an Australian court, a number of concerned individuals sought to lay their situation before the courts, in order that, at the very least, they have the opportunity to do so themselves. Two actions were brought on in the Federal Court in Melbourne on 31 August 2001, the first by the Victorian Council for Civil Liberties, and the second by Eric Vadarlis. Once these actions were commenced a number of other parties sought permission to intervene in support of these applications, including

⁶ Four Indonesian nationals, Bastian Disun, Nordames Nordin, Aldo Benjamin and a juvenile, were charged with immigration offences.

⁷ The acronym SUNC stands for Suspected Unlawful Non-Citizen and is used internally by Australian Government departments.

Amnesty International, and the Human Rights and Equal Opportunities Commission.⁸

The relief sought by the applicants was to have the rescuees aboard the *Tampa* brought ashore and to be dealt with under the *Migration Act 1958* (Cth), or in the alternative, by a writ of *habeas corpus* to compel the release of the individuals from the ship.⁹ In addition, Vadarlis also sought orders to permit him to communicate with the rescuees on the basis that his failure to communicate with them infringed the implied constitutional right to freedom of communication.¹⁰

The day the applications were filed, the applicants sought an interlocutory injunction to prevent the *Tampa*'s departure from Australian waters, as its leaving would have frustrated any orders the Court might make in favour of the applicants.¹¹ A flurry of legal and diplomatic activity ensued, culminating on 3 September with an announcement that the parties had reached agreement that the rescuees would be transferred to the *Manoora*. A mediated agreement between the parties provided that no rescuees would leave *Manoora* until after the matter had been determined by the Court.¹² This had the advantage of removing at least some of the urgency from the application, as it would be apparent that it would take many days for *Manoora* to reach Nauru.

Judgment was handed down by North J. on 11 September 2001.¹³ His Honour considered five separate arguments raised by the applicants: that the detention of the rescuees aboard the *Tampa* was unlawful, and they should, therefore, be released; that the respondents lacked the authority to expel the rescuees from Australia; that sections 245F and 189 of the *Migration Act 1958* (Cth) would require the respondents to bring the rescuees into Australia and place them into immigration detention;¹⁴ and, an argument based upon Mr Vadarlis' implied freedom of communication being infringed. It is appropriate to consider each argument in turn.

⁸ *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297, paragraph 8 [hereafter "*VCCL v Minister for Immigration*"].

⁹ *VCCL v Minister for Immigration*, paragraph 4.

¹⁰ *VCCL v Minister for Immigration*, paragraph 6.

¹¹ *VCCL v Minister for Immigration*, paragraph 29.

¹² *VCCL v Minister for Immigration*, paragraph 42.

¹³ Although this was the date of the terrorist attacks in the United States, owing to the time difference between Australia and North America, the judgment was handed down hours prior to news of the attacks reaching Australia.

¹⁴ These submissions were treated separately by His Honour.

North J. first considered the argument based upon unlawful detention, and the availability of a writ of *habeas corpus* to the rescuees. His Honour reviewed authority on the nature of the writ and the situation in which the rescuees found themselves. He rejected the Commonwealth's view that the rescuees had three possible means of escape from their present predicament, in that they could not leave the ship, which itself would not leave with them on it; no one, apart from the Commonwealth, had offered to take them elsewhere, and they were prohibited from entering Australia; and, the arrangements to take them to Nauru.¹⁵ In relation to the last of these means of escape, the Commonwealth had argued that any restraint on the rescuees was partial. North J. rejected this, on the basis that there was no "reasonable means of egress" available, and that the rescuees were likely to have formed a view that since there were 45 armed soldiers aboard, they were bound to do as they were told.¹⁶

This issue is one which could have been approached in a different fashion by the Court and the parties. It is notable that all of the cases referred to in the judgment are terrestrial cases concerned with false imprisonment. The concept of detention of a vessel was not addressed in a manner distinct from that of the individuals aboard. It is clear that when the *Tampa* entered the territorial sea, what amounted to an arrest of the vessel took place. Armed ADF personnel boarded the vessel, albeit by invitation, and the vessel was not permitted to proceed further. However, it does not follow that the arrest of a vessel, or the redirection of a vessel from its intended destination, has the consequence of arresting all those aboard.

This can be illustrated by example. If the *Tampa* committed a serious breach of navigation regulations, perhaps travelling in the wrong lane in a traffic separation scheme, Australian personnel might board the vessel and bring it to a new course. Depending on the nature of the offence, they might even choose to arrest the master or a member of the crew. But it does not follow that at the moment the vessel is brought under Australian control, that every person on board was arrested as well. It would be bizarre if a cook on board the ship, unaware of its navigational offence, was detained just because the ship's course was altered. The cook would be able to successfully proceed against the Commonwealth for unlawful detention, simply because he or she had been detained when the ship was stopped, yet the Commonwealth could have no grounds to arrest the cook.

¹⁵ *VCCL v Minister for Immigration*, paragraphs 50-72.

¹⁶ *VCCL v Minister for Immigration*, paragraphs 73-87.

In the real incident *Tampa* was stopped because it entered Australian waters without approval, and contrary to a request to refrain from doing so. The stopping of the ship and prevention of its continuation did not have as a consequence the arrest of every person aboard. They were merely passengers, and were not directly responsible for the ship's course or action. Even if such responsibility could be slated home to individual rescuees, it is difficult to see that it could apply to all aboard. These arguments were not pursued by the Court, and North J. considered that the applicants should succeed in their argument that the rescuees were entitled to a writ of *habeas corpus*. The irony of seeking a writ of *habeas corpus* so as to permit individuals to go into immigration detention was not lost on his Honour, but he did not see this as a mechanism to prevent making orders for the release on to the Australian mainland of the rescuees.¹⁷

North J. next considered whether there was a prerogative power to order the expulsion of the *Tampa* and the rescuees from Australia. After reviewing authority he reached the conclusion that the *Migration Act* was intended to regulate activities in this area, and thus there was no room for an exercise of executive power in that fashion.¹⁸ Claims under the remaining grounds for the applicants were rejected by North J., most significantly because of a lack of standing to bring the action on the part of the applicants. His Honour, while attracted to the analysis of the minority in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*,¹⁹ felt obliged to apply the High Court's decision in *ACF v Commonwealth*,²⁰ which would deny the applicants standing.²¹ In addition, he noted that the right to freedom of communication sought by Mr Vadarlis was not available to aliens and, therefore, not to the rescuees.²²

On Appeal

The Commonwealth immediately appealed North J.'s decision to the Full Court of the Federal Court. As *Manoora* was potentially going to be journeying back to Australia or travelling on to Nauru, depending on the outcome of the appeal, so a degree of expedition was needed. This in fact

¹⁷ *VCCL v Minister for Immigration*, paragraphs 88-109.

¹⁸ *VCCL v Minister for Immigration*, paragraphs 110-122.

¹⁹ (1998) 194 CLR 247.

²⁰ (1980) 146 CLR 493.

²¹ *VCCL v Minister for Immigration*, paragraphs 123-137.

²² *VCCL v Minister for Immigration*, paragraphs 162-168.

did occur, with orders being made on 17 September, and reasons given one day later. The case was heard by Black CJ., Beaumont and French JJ. under the name *Ruddock v Vadarlis*.²³

The Court divided on the principal issue of the availability of executive power. Beaumont J. took the view that a writ of *habeas corpus* to release and bring the rescuees into Australia would achieve a result that was contrary to Australian law and, therefore, that was a matter for the executive.²⁴ French J. took a similar view and in his judgment stated:

In my opinion, the executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion. This does not involve any conclusion about whether the Executive would, in the absence of statutory authority, have a power to expel non-citizens other than as an incident of the power to exclude. The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia community, from entering.²⁵

His Honour, supportive of the above, found that the *Migration Act 1958* (Cth) had not abrogated the executive power of the Commonwealth, and that executive action to prevent the *Tampa* and its passengers from entering Australia was permissible. His Honour further stated:

The steps taken in relation to the MV *Tampa* which had the purpose and effect of preventing the rescuees from entering the migration zone and arranging for their departure from Australian territorial waters were within the scope of executive power. The finding does not involve a judgment about any policy informing the exercise of that power. That is a matter which has been and continues to be debated in public and indeed international forums. Through that debate and the parliamentary process the Ministers involved can be held accountable for their actions. If Parliament is concerned about the existence of an executive power in this area, deriving from section 61 of the Constitution, it can legislate to exclude it by clear words. The task of the Court is to decide whether the power exists and whether what was done was within that power, not whether it was exercised wisely and well.²⁶

²³ [2001] FCA 1329.

²⁴ *Ruddock v Vadarlis*, paragraph 104.

²⁵ *Ruddock v Vadarlis*, paragraph 193.

²⁶ *Ruddock v Vadarlis*, paragraph 204.

Black CJ. dissented, again focusing upon the issue of the exercise of executive power. His Honour found that the prerogative could not be used to remedy deficiencies in the statutory regime. As such, if the *Migration Act* could not be used to expel the individuals, he did not feel that such an expulsion could be achieved unilaterally.²⁷ He would have dismissed the appeal from North J.'s judgment.

As the appeal was dismissed, the *Manoora* continued towards Nauru, where it ultimately discharged its cargo. While there was some speculation that an appeal to the High Court would be made, the lawyers acting for the benefit of the rescuees, facing the prospect of substantial litigation borne at their own cost, did not pursue the possibility with vigour. On 27 November 2001, the High Court refused special leave to appeal to the lawyers.²⁸

Interception

The first issue is to consider whether Australia could move to intercept and board the *Tampa*. Leaving aside the question of whether the *Tampa* was in distress and that there was a duty owed by Australia to render assistance to the vessel, it is clear Australia could request the *Tampa* not enter Australian territorial waters, and that ADF personnel could validly board the vessel.

While waiting 13.5 nautical miles off Christmas Island, the *Tampa* was in Australia's contiguous zone. Under Article 33 of the Law of the Sea Convention, Australia would have had jurisdiction over the *Tampa* with respect to a variety of matters, including to "prevent infringement of its ... immigration ... laws and regulations within its territory or territorial sea." However, there was no restriction on *Tampa*'s freedom of navigation, so it could remain in the Australian contiguous zone for as long as its captain wished. Although there was some probability that *Tampa* would breach the Australian immigration laws while it was stationary, it was also possible no breach of Australian law would occur.

Things changed once *Tampa* began to head towards Christmas Island. While vessels have a right of innocent passage through another state's territorial sea, it is clear that *Tampa* was not seeking to pass through the Australian territorial sea. It wished to call at an Australian port. It had no

²⁷ *Ruddock v Vadarlis*, paragraphs 1-64.

²⁸ See <http://www.ag.gov.au/aghome/agnews/2001newsag/Tampacosts.htm>.

right to do so, because Australian authorities had indicated explicitly that *Tampa* would not be welcome at an Australian port and that Christmas Island was closed to all maritime traffic. By any definition, the passage could not be regarded as innocent, and Australia was entitled to take enforcement action to board the vessel.²⁹

Duty to Rescue

One matter raised into sharp relief during the *Tampa* incident was the extent of state obligations to rescue individuals and provide assistance to them. This issue was integral to the incident, as it created the crisis in the first place, and subsequently was at the core of the dilemma faced by Australian policymakers. Some review of the relevant international law is necessary. Customary international law has long recognised that there is a duty upon mariners to come to the assistance of individuals in distress on the sea. While the duty is not absolute, in the sense there is no requirement on an individual to place their own life in significant hazard, it is clear that, where it is possible to provide assistance, there is a positive requirement that it be rendered.³⁰

This customary international law duty is reflected in the 1982 United Nations Convention of the Law of the Sea. Article 98 provides:

Duty to Render Assistance

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

- (a) to render assistance to any person found at sea in danger of being lost;
- (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

²⁹ This situation is not dissimilar to the interception of the *Lusitania Expresso* by Indonesia when that vessel was seeking to visit the port of Dili (then in Indonesia) as a public protest to Indonesian rule. The voyage had received a great deal of publicity, so it was reasonable to assume that in entering the Indonesian territorial sea *en route* to Dili, the *Lusitania Expresso* was not exercising a right of innocent passage. See the discussion in D.R. Rothwell, "Coastal State Sovereignty and Innocent Passage: The Voyage of the *Lusitania Expresso*," *Marine Policy*, Vol. 16, 1992, pp. 427-437.

³⁰ See D.P. O'Connell, *The International Law of the Sea*, ed. by I.A. Shearer, Clarendon Press, Oxford, 1982.

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

The seriousness with which this provision is viewed by the international community is underscored by Article 18(2) of the Law of the Sea Convention.³¹ This provision provides that rendering assistance to those in distress constitutes an exception to the regime of innocent passage. Given the reluctance of states to accept fetters upon their sovereignty in the territorial sea, the clear acceptance of this one demonstrates the importance of this duty. While Article 98 clearly refers to a duty upon ships to render assistance to individuals in distress at sea, the scope of the duty is wider. There are a range of international legal instruments that seek to clarify and amplify the obligation, and to support the requirement for cooperation between states. The duty has also assisted in the wider efforts of the International Maritime Organization towards encouraging improvements in ship safety at sea, the best known element of which is the Safety of Life at Sea Convention (SOLAS).³² The particular instrument of relevance to the present situation is the 1979 International Convention on Maritime Search and Rescue (ICMSR).³³

The ICMSR provides a specific duty upon states to render assistance to persons in distress. This is contained in Chapter 2.1.10 of the Annex to ICMSR, which provides:

³¹ Article 18(2) of the Law of the Sea Convention provides:

Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

³² International Convention for the Safety of Life at Sea, done at London 1 November 1974, in force 25 May 1980, for Australia 17 November 1983: Australian TS 1983 No. 22.

³³ Done at Hamburg 27 April 1979, entered into force 22 June 1985: Australian Treaty Series 1986 No. 29.

Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

The duty to render assistance at international law does not assume a duty for the flag state of an assisting vessel to take in the rescuees. To have required such a duty would create difficulties, given the often remote location of flag states from the locations of shipping flying their flag. Similarly, there is no reference to the nearest coastal state being obliged to take in rescuees. The scope of the duty is merely to render assistance, and in certain circumstances this may be possible at sea. This can be illustrated by example. Consider the rescue of a lone yachtsman from the sea 13 nautical miles off the coast of China by a passing Australian warship. Rendering assistance is an exception to a right of innocent passage, but not a ticket that would require immediate entry into the ports and internal waters of a coastal state. China would be within its rights to refuse entry to the Australian warship to a Chinese port to disembark the yachtsman, as adequate assistance to him could be provided at sea.³⁴

In the case of the *Tampa*, Australian authorities were obliged to assist the ship to either become seaworthy and proceed, or be abandoned. The latter was never an option, as there was never any danger of the *Tampa* foundering, although clearly it could not safely proceed from Christmas Island with more than 350 people in excess of its safe complement. Australia was clearly under a duty to assist *Tampa*, and this would certainly include the rendering of humanitarian assistance. This might have included removing the rescuees from the vessel, or to have taken measures to ensure the ship met SOLAS requirements before allowing it to leave Australian waters. However, it would not be accurate to state that there was positive requirement to permit the vessel to dock at Christmas Island. Arranging for the rescuees to be removed from *Tampa* to a suitable vessel equipped for their transit, namely HMAS *Manoora*, met that obligation, as did the provision of food, additional shelter, medical supplies and medical personnel to the rescuees while aboard *Tampa*.

The only issue raised by Australia's action, therefore, was whether the duty to render assistance was exercised in a timely and sufficient fashion. While the provision of *Manoora* was ultimately sufficient to aid the rescuees, the ship itself was not present in the vicinity of the incident at

³⁴ An analogous point is made by Beaumont J. in *Ruddock v Vadarlis* where his Honour noted that a duty to render assistance did not place an obligation upon a coastal state to resettle individuals: paragraph 126.

the time of *Tampa*'s arrival at Christmas Island. The lawyer engaged by the *Tampa*'s owners and master was quoted by North J. to describe the situation aboard *Tampa* one day after collecting the passengers of the *Palapa* as "critical" and, "[i]f it [the medical situation] is not addressed immediately people will shortly die."³⁵ A number of news reports indicated that various numbers of the rescuees were embarking on a hunger strike, and concern for the state of the passengers was the reason given by Captain Rinnan to take the *Tampa* into Australian waters.

Had the situation been as serious as suggested, Australian action might well have been questionable, but the facts do not bear out that assessment of the conditions aboard the *Tampa*. Even though death and serious medical conditions were alluded to, none of the rescuees ultimately did die, nor did any require hospitalisation. This is suggestive that the Australian response was adequate in the circumstances, although the validity of the action would ultimately depend upon the state of knowledge the Australian authorities had of conditions aboard the vessel.

The scope of assistance provided to the *Tampa* from the shore was also substantial. In answer to a question in the House of Representatives, the Minister for Immigration on 30 August 2001 stated:

A resupply of the vessel occurred late yesterday. It was undertaken by Defence personnel and consisted of humanitarian supplies in the form of food, blankets, nappies, and other personal products, and shade cover was also supplied. A further resupply was completed a short time ago consisting of further humanitarian supplies including items known as "comfort packs" which included toothbrushes, soap and the like. We do intend to deliver portaloos to the vessel. There is sufficient water on board with some 207 tonnes. The ship has a desalination facility and a doctor remains on board. There are no reports of significant medical problems, as the Prime Minister outlined in answer to a question he received from the Leader of the Opposition. The only medical treatment that the doctor has reported today was for a broken fingernail and a cut thumb. Another two C-130 Hercules shuttles with general stores are scheduled to fly into Christmas Island today and Australia does remain committed to providing humanitarian assistance to all the people on the vessel.³⁶

³⁵ *VCCL v Minister for Immigration*, paragraph 22 (emphasis removed from the latter quotation).

³⁶ See http://www.dfat.gov.au/media/Tampa_qwon_reps_r1300801.html.

If the Minister's answer accurately describes the situation aboard *Tampa* and the efforts made by Australia within 48 hours of the vessel proceeding towards Christmas Island, it would seem that the duty to render assistance was substantially discharged. Accordingly, there would seem to be no requirement in international law that would have obliged Australia to remove the individuals from the *Tampa* to Christmas Island.

The validity of the action is also confirmed at common law. The standard imposed at common law was indicated by Lord Stowell in the *Eleanor* in 1809, when his Lordship held that a vessel must be in "real and irresistible distress" proved by clear and satisfactory evidence, and in such circumstances that "must be at all times a sufficient passport for human beings" entitling them to the hospitality of a British port.³⁷ The *Tampa's* situation was hardly irresistible if sufficient support and assistance could be provided by other means. The provision of the facilities aboard *Manoora* met that requirement adequately; therefore, there was no common law obligation for the *Palapa's* passengers and crew to be permitted entry to Australia.

Refugees

Status

Another issue at the core of the *Tampa* incident was the status of the *Palapa's* passengers. These individuals were seeking to enter Australia, and from what limited evidence is available, were intending to seek political asylum upon arrival.³⁸ The majority appear to possess or at least claim Afghan nationality, although a number of other states' nationals were also included. The implications of what would happen, were the rescuees to be brought ashore and claim asylum, were the factors that drove Australian policy during the incident.

At international law, the treatment of refugees claiming asylum is, like the duty to render assistance, of great age, and has been incorporated into modern treaty law. The Convention relating to the Status of Refugees,³⁹

³⁷ Edw. 135.

³⁸ This is evidenced by a statement made by the Norwegian Ambassador after visiting the ship, where he read out an appeal from the rescuees indicating their wish to seek asylum in Australia. The statement was incorporated into North J.'s judgment in the litigation at first instance: *VCCL v Minister for Immigration*, paragraph 28.

³⁹ Done at Geneva 28 July 1951, entered into force 22 April 1954: Australian TS 1954 No. 5.

and its Protocol,⁴⁰ deals with the obligations upon state parties (including Australia) when dealing with refugees arriving in their territory. A refugee is defined, under Article 1, as a person with a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, who is outside their country of nationality, and is unwilling or unable to seek its help, and is unwilling to return. Most importantly in the context of the *Tampa* incident, is the obligation upon states under Article 33 of the Refugees Convention, which contains the non-refoulement principle:

1. No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This provision restricts a state that has individuals with refugee status from deporting those individuals to where they might be persecuted, and has the effect of restricting the similar expulsion of any person claiming such status, at least until that claim has been reviewed. Accordingly, at international law, if the rescuees had entered Australia and made a claim that they were refugees, Australia could not deport them back to their country of origin without breaching an important provision of the convention, and of customary international law.

The standard which is set by international law is determined domestically by state parties, and in the case of Australia is found in the operation of the *Migration Act*.⁴¹ The Act adopts the international standard, and puts in place review mechanisms, which themselves can be subject to administrative review by a specialised agency. These procedures typically take many months and, as a result, detention centres have been established at a variety of locations to house asylum-seekers pending the resolution of their status.

The issue in the case of the *Tampa* incident was whether the individuals concerned could claim refugee status with respect to Australia as a result of being present upon a Norwegian-flagged merchant vessel in the Australian territorial sea, or from boarding an Australian warship: namely HMAS *Manoora*.

⁴⁰ Done at New York 31 January 1967, entered into force 4 October 1967, for Australia on 13 December 1973: Australian TS 1973 No. 37.

⁴¹ *Migration Act 1958* (Cth), section 36.

The first point to note is that the rescuees at no stage entered Australian territory, so the requisite standard applicable should be on seeking asylum through extra-territorial means. Shearer notes that there is a clear difference in the application of principles of asylum between cases occurring within the territory of a state, and cases occurring extra-territorially. In the latter situation, the granting of asylum is typically more difficult and limited, and often involves a most direct threat to the life of the individual seeking asylum.⁴² However, it should be noted that these cases are principally concerned with entry to legations and embassies, and not to vessels floating about in a state's territorial sea.

Two points of note can be made. Firstly, whatever action Australia was to take, it had to be consistent with its own domestic law, which in turn gave effect to the obligations placed on Australia internationally. This meant that if the *Migration Act* permitted a claim to be made by an individual, then Australian authorities were obliged to deal with that claim. Secondly, whatever action Australia proposed to take, it could not act in a fashion so as to infringe the *non-refoulement* principle.

The provisions in the *Migration Act* dealing with applications for protection visas for refugees are contained in Division 3. The operation of these provisions is limited to persons within Australia,⁴³ which under the Act is limited to the "migration zone." The Act's definition of this area is significant:

migration zone means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:

- (a) land that is part of a State or Territory at mean low water; and
 - (b) sea within the limits of both a State or a Territory and a port; and
 - (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;
- but does not include sea within the limits of a State or Territory but not in a port.⁴⁴

⁴² I.A. Shearer, *Starke's International Law*, Butterworths, London, 1994, pp. 323-328.

⁴³ Section 36(2) *Migration Act 1958* (Cth) provides:

A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

⁴⁴ *Migration Act 1958* (Cth), section 5.

For the purposes of the Act, where a person wishes to seek a protection visa as a refugee, they must have entered Australia, and this requires their presence within the migration zone.⁴⁵

At no stage did the *Tampa* pass through an area of sea which could be described as a port. Therefore, although within the territorial sea, the ships never entered the migration zone. It is significant that *Tampa* was boarded by ADF personnel at a distance of four kilometres from Christmas Island. Although *Tampa* was too large to dock at the Flying Fish Cove, it may have been able to anchor in a roadstead used by larger vessels. This could have been treated as part of the port, potentially placing the vessel in the migration zone. Whether the *Tampa* was boarded and stopped for this reason, or was stopped without there being any awareness of the implications of its continued progress is unclear, and likely to remain so for the foreseeable future. However, since there was no entry of any of the rescuees into the migration zone, no application for protection visas could be made.

The same could be said of the *Manoora*, even though it is an Australian-flagged sovereign immune vessel. Although Australian law applies aboard all Australian-flagged vessels, including Australian warships, it is clear that not all Australian law operates on Australian warship at all times. The *Migration Act*, by limiting certain of its provisions to fixed geographical criteria, ensures that those provisions so limited are not deemed to operate aboard Australian ships, or in Australian missions overseas. Being aboard *Manoora* confirmed that Australian law applied to the rescuees, but not that *Manoora* was some sort of floating exception to the geographical requirements of the migration zone, fixed by section 5 of the *Migration Act*. As such, since *Manoora* did not enter an Australian port, it never entered the migration zone, and no claim pursuant to section 36 of the *Migration Act* could be made.

⁴⁵ Section 6 *Migration Act 1958* (Cth) provides:

To avoid doubt, although subsection 5(1) limits, for the purposes of this Act, the meanings of *enter Australia*, *leave Australia* and *remain in Australia* and as well, because of section 18A of the *Acts Interpretation Act 1901*, the meaning of parts of speech and grammatical forms of those phrases, this does not mean:

- (a) that, for those purposes, the meaning of *in Australia*, *to Australia* or any other phrase is limited; or
- (b) that this Act does not extend to parts of Australia outside the migration zone; or
- (c) that this Act does not apply to persons in those parts.

Removal

A separate issue from the status of the individuals as refugees was the legality of their trans-shipment to Nauru. Since some of the rescuees may have been refugees, and findings to this effect for some of the rescuees who were taken to New Zealand have already been made,⁴⁶ it is clear that it would be inconsistent with Article 33 of the Refugees Convention to return the individuals to their countries of origins. While the rescuees may not have entered Australia, it would seem that Australia would be in breach of its obligation in respect of *non-refoulement* as the individuals were under its care, control and jurisdiction.

However, Australia's action in transporting individuals to Nauru, and subsequently by air to New Zealand did not breach its Article 33 *non-refoulement* obligation. The rescuees were not being returned to any location where they were under threat, but rather to a third state, where their claims of refugee status could be validly assessed, under international scrutiny. Thus, the individuals were being taken to a place of safety, the spirit of Article 33 was not breached, and the action was internationally valid.

Domestically, the validity of the removal was potentially questionable, and this led the Commonwealth to seek the passage of what amounted to retrospective legislation to legitimise any removal to another state. The *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) was passed, receiving Royal Assent on 27 September 2001. Among other provisions, discussed elsewhere in this paper, the legislation explicitly deemed lawful all actions by the Commonwealth and its officers in relation to the *Tampa*, the *Palapa* and all individuals aboard those vessels.⁴⁷

State Practice

A cursory search has found examples of state practice to support the removal of possible asylum seekers intercepted in illegal-entry vessels out to sea. Italy in the early 1990s began to treat all potential asylum seekers crossing the Adriatic from Albania as "economic refugees." As such, it

⁴⁶ As at 22 December, New Zealand officials had approved 122 of 131 rescuees from the *Tampa* as refugees. Further information was being sought concerning the other nine: <http://www.refugee.org.nz/archive2001.htm>, 22 December 2001.

⁴⁷ *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), sections 5 and 6.

took the view that it could deport these individuals without further investigation of their status. Accordingly, Italian authorities began to take Albanian vessels in tow and ferry them back across the Adriatic to Albanian territorial waters. This necessitated a journey across the high seas, as the Adriatic is more than 24 nautical miles wide.

During the height of the Vietnamese "boat people" crisis of the late 1970s, Malaysia, Thailand and Indonesia each periodically expelled vessels containing Vietnamese asylum seekers from their waters by towing the vessels out to sea. Malaysia has reportedly continued the practice by towing vessels containing Burmese nationals out of its waters, and was subject to withdrawal of limited military training aid by the U.S. Congress in 1990 for towing away vessels containing over 5,000 potential asylum seekers in 20 vessels.

The United States has engaged in turning away vessels, including towing, bound for its Florida and Gulf coasts from Cuba and Haiti. The U.S. Coast Guard has undertaken towing operations in respect of the former of these two states for many years, and has adopted a policy of returning Cuban nationals to Cuba if they are intercepted in the water, but not if they reach the land territory of the United States.

The Bahamas undertook the towing of Cuban-registered fishing vessels from its waters in 1980, to which the Cubans allegedly responded with attacks by its aircraft upon Bahamian vessels. Presumably this action was accompanied by more formal objections.

Removal at Voyage's End

Another issue faced by Australian authorities, long after the *Tampa* had recommenced its voyage to Singapore, was the removal of the rescuees from the *Manoora* once that ship had reached Nauru. As noted above in the factual summary, some individuals refused to leave the ship and insisted to be taken to Australia. This led to a stand-off on board *Manoora* for several days, and to some further negative publicity in the Australian and international media.

Of concern was the source of authority under Australian law for the forced removal of individuals from the vessel. Provisions with respect to trespass involving Defence assets are directed at land and, therefore, are not entirely suitable as a basis for action involving individuals aboard a

ship.⁴⁸ A better point of view would be to argue that the individuals were passengers aboard *Manoora*, and thus were obliged to obey the lawful commands of *Manoora*'s commanding officer.

Were *Manoora* a civilian vessel, this authority would be easily established. Sections 281 and 282 of the *Navigation Act 1912* (Cth) provide the master of a vessel the power to deal with disorderly passengers and to make them quit the ship when requested by an officer. Unfortunately, these sections of the *Navigation Act* do not apply to naval vessels. Formerly, a provision did deal with this situation under the *Naval Defence Act 1910* (Cth). Section 36 of the Act (now repealed) incorporated British Royal Navy discipline law. This would have incorporated the *Naval Discipline Act 1957* (UK). Section 117 of the *Naval Discipline Act* provided for the application of limited naval disciplinary control over civilians aboard Her Majesty's warships. This situation would have covered the situation of the *Tampa* rescuees, but this provision was repealed with the rest of the applied British law with the introduction of the *Defence Forces Discipline Act 1982* (Cth). There is no equivalent provision presently in the *Defence Forces Discipline Act*.

Without statutory authority, it may be appropriate to look to the common law to justify the commanding officer's control over individuals upon the vessel. In this regard, there is nineteenth century authority that confirms that the master of a vessel may use reasonable force to exercise control over individuals upon the vessels, apart from the crew, and this includes the removal of an individual from the vessel. In this, authority suggests that the master must use only reasonable force to put someone off the vessel. If this standard is exceeded, or the master's authority is exceeded, then he/she may be liable in damages.⁴⁹

Legislative Responses to the *Tampa* Incident

In the aftermath of the *Tampa* incident, the Commonwealth passed a number of pieces of legislation directed at shoring up border protection. The first of these was the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth). This Act, as was discussed above, provided for the validation in respect of all Commonwealth activities surrounding the *Tampa*, the *Palapa*, and all their unfortunate passengers. However, the

⁴⁸ *Defence Act 1903* (Cth), section 82.

⁴⁹ *Newman v Walters* (1804) 3 Bos & P 612; *Boyce v Bayliffe* (1807) 1 Camp 58; *Boyce v Douglas* (1807) 1 Camp 60; *King v Franklin* (1858) 1 F & F 360.

Act also sought to clarify and broaden certain powers of Commonwealth officers under the *Customs Act 1901* (Cth) and the *Migration Act 2001*. These changes indemnify the actions of officers in exercising powers,⁵⁰ and give wider powers to search individuals.⁵¹ In addition, there are powers to return individuals to their ships,⁵² and to take those persons and ships detained to a place outside Australia, if that is desired by the officer.⁵³ Furthermore, the Act buttresses the decision of the Full Federal Court in the *Tampa Case* by explicitly stating that none of the changes to the *Migration Act* are intended to displace the executive power of the Commonwealth to eject individuals across Australia's borders, in an effort to protect those borders.⁵⁴

The other legislative changes came in the context of twin pieces of legislation designed to amend provisions in the *Migration Act: Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); and, *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth). The former amending Act provides that certain places that may be part of the migration zone are explicitly excised from it, with effect from specific dates. For example, Christmas Island and the Territory of the Ashmore and Cartier Islands were excised from the migration zone with effect from 2.00pm on 8 September 2001 in the legal time of the Australian Capital Territory. The cut-off date and time for the Cocos (Keeling) Islands was 12 noon ACT time on 17 September 2001. Other territories can be excised from the migration zone by Regulation. In addition, sea installations and resources installations, such as oil or gas platforms, are excised from the commencement of the Act, which was 27 September 2001.⁵⁵ An applications for visas made by individuals arriving at any of these places are deemed invalid,⁵⁶ although the Minister may exercise a discretion to permit the application if he feels that it is in the public interest to do so.⁵⁷

⁵⁰ Now contained in sections 245F(9B) *Migration Act 1958* (Cth) and 185(3AB) *Customs Act 1901* (Cth).

⁵¹ Now contained in sections 245FA *Migration Act 1958* (Cth) and 185AA *Customs Act 1901* (Cth).

⁵² Now contained in sections 245FB *Migration Act 1958* (Cth) and 185AB *Customs Act 1901* (Cth).

⁵³ Now contained in sections 245F(9) and (9A) *Migration Act 1958* (Cth) and 185(3A) and (3AA) *Customs Act 1901* (Cth).

⁵⁴ Now contained in section 7A *Migration Act 1958* (Cth).

⁵⁵ *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth), section 2.

⁵⁶ Now section 46A(1) *Migration Act 1958* (Cth).

⁵⁷ Now section 46A(2) *Migration Act 1958* (Cth). Interestingly, this power is only exercisable by the Minister personally, and must be accompanied by a statement of reasons to both Houses of Parliament: section 46A(3), (4), (5) and (6) *Migration Act 1958* (Cth).

The *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) provides additional support for the moving of individuals to certain proclaimed countries,⁵⁸ and to ensure that individuals detained in excised areas outside of the migration zone may be detained.⁵⁹ Legal proceedings arising out of the attempted entry of individuals to the now excised parts of the migration zone, and the lawfulness of their detention, are no longer able to be sustained before an Australian court.⁶⁰

Conclusion

The Commonwealth Government went to extraordinary lengths to ensure the *Tampa's* cargo of unwilling passengers did not enter Australia, and even greater lengths to ensure that they would not be alone in being refused the opportunity to step ashore. The excision of parts of the migration zone was an example of the manner in which the issue was, and is, viewed. [From a legal point of view, the actions taken were probably lawful, and if doubts could be entertained, these have been largely addressed by the new legislative responses to the incident.] Domestically, the *Tampa* incident itself has "done its dash" within the Australian court system, and further challenges to the legislative regime await a new set of facts.

Internationally, there is little likelihood of further action. International disapproval of Australia's action appears to have faded with a greater concern for border protection in the wake of the terrorist attacks in the United States on 11 September 2001. Even the Australian domestic media largely abandoned discussion of the *Tampa* litigation after the horror of the events in New York, Washington and elsewhere, accompanied by the almost simultaneous failure of one of the two principal national airlines. Whether younger asylum seekers can swim has more recently occupied the media, but this presupposes that the solution is in place, not a revisiting of the adequacy or legality of the solution.

Australia does retain its acceptance of the jurisdiction of the International Court of Justice, so conceivably it could be brought to the Court by another interested party. Norway, as the flag state, and Afghanistan, as the state of nationality for the bulk of the rescuees are the most obvious

choices. Norway has shown little interest in embarking upon such a course, at least publicly, while Afghanistan has undergone a profound change in its internal arrangements since the *Tampa* incident, and expensive international litigation would also seem unlikely at present. What is clear is that the excision of the external territories to combat the problem raised by the *Tampa* itself cannot in the long term prevent arrivals to Australia. Whether the excision of parts of the Northern Territory, Queensland and Western Australia from the migration zone is politically and legally acceptable remains to be seen.

⁵⁸ Now section 198A *Migration Act 1958* (Cth).

⁵⁹ Now section 189(3), (4) and (5) *Migration Act 1958* (Cth).

⁶⁰ Now section 494AA *Migration Act 1958* (Cth).